IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

MONDAY, THE 8TH OCTOBER 2007 / 16TH ASWINA 1929

RPFC.No. 402 of 2007()

MC.349/2004 of FAMILY COURT, THRISSUR
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PETITIONER/RESPONDENT:

DAVIS, AGED 45 YEARS,
S/O. CHEERAMBAN THOMAS,
THRIKKOOR VILLAGE, DESOM,
MUKUNDAPURAM TALUK.

BY ADV. SRI.DINESH MATHEW J.MURICKEN
SRI.P.V.BALAKRISHNAN

RESPONDENTS: PETITIONER:
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1. THOMAS, AGED 78 YEARS,
S/O. CHEERAMBAN THARU, PONNUKKARA DESOM,
THRIKKUR VILLAGE, MUKUNDAPURAM TALUK.

2. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.

BY ADV. SRI. K.S. SIVAKUMAR, PUBLIC PROSECUTOR
SRI.RENJITH THAMPAN
SMT.P.A.ANITHA

THIS REV.PETITION(FAMILY COURT) HAVING COME UP FOR ADMISSION ON 08/10/2007, ALONG WITH WPC NO. 8175/ 2006,THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

"CR"

V. RAMKUMAR , J

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R.P(F.C) NO. 402 OF 2007

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W.P.(C) NO. 8175/2006

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Dated this the 8th day of October, 2007.

ORDER

The common petitioner in both the writ petition as well as the revision petition is the son of the common respondent-Thomas. The said respondent is the 78 year old father of the petitioner. In the year 2004 he filed M.C. No. 349/2004 against the revision petitioner seeking maintenance under Section 125 Cr.P.C at the rate of Rs.5000/- per month. On 01.03.2005 the Family Court passed an interim order (produced as Ext.P2 in the Writ Petition) directing the revision petitioner to pay interim maintenance at the rate of Rs.300/-. Subsequently, the Family Court passed the final order on 26.02.2007 awarding maintenance at the rate of Rs.1000/- per month from the date of petition after striking off the defence of the revision petitioner/respondent for the reason that he failed to pay the interim maintenance ordered on 01.03.2005. The writ petition is directed against the order dated 01.03.2005 awarding interim maintenance. The Crl. R.P is filed challenging the final order for maintenance.

2. There is no dispute that the respondent/father had not filed any written application for interim maintenance either along with or subsequent to the filing of the M.C which is the application for maintenance. After the amendment of the Cr.P.C with effect from 24.09.2001, there cannot be any dispute that an order for interim maintenance can be passed only if there is an application for the same. This is indicated by the 2nd and 3rd provisos to Section 125 (1) Cr.P.C which read as follows:

> "Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:
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> Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possile, be disposed of within sixty days from the date of the service of notice of the application to such person."

Even before the above amendment of the Cr.P.C and at a time when there was no enabling provision to award interim maintenance under Section 125, the Apex Court in **Savitri v. Govind Sing** (AIR 1986 SC 984) held that an order for interim maintenance could be granted even without any enabling provision in the Cr.P.C but held that even in

such case the Magistrate should insist upon an affidavit to be filed by or on behalf of the applicant concerned stating the grounds in support of the claim for interim maintenance to satisfy himself that there is a prima facie case for making such an order. It was further observed that if the allegations in the affidavit are not true, it is always open to the person against whom such an order for maintenance is made to show that the order was unsustainable. Any way, now after the 2001 amendment of the Cr.P.C, the position is very clear that there should be a written application for interim maintenance. Hence, the order for interim maintenance passed without any written application in that behalf is quashed.

3. Now coming to the final disposal of the M.C. 349/2004, the Magistrate passed the final order without giving the revision petitioner an opportunity to contest the matter. In fact, the revision petitioner's defence was struck off for the reason that he did not pay the interim maintenance as ordered. It has already been held that in the absence of written application for interim maintenance, the Family Court went wrong in ordering interim maintenance. If so, the final order passed after striking off the defence of the revision petitioner also cannot have any legs to stand on even assuming that the court below possessed the power to strike off the defence . In fact, in **(Vinod v. Chhaya)** I

(2003)DMC 580 and in **Gurvinder Singh v. Murti** 1991(1) Crimes 18, the Panjab and Bombay High Courts have taken the view that the Magistrate does not possess the power to strike off the defence for failure to pay interim maintenance. Just as the maintenance awarded under the final order for maintenance can be recovered only as if it were a fine, the interim maintenance also can be recovered only as if it were a fine by resorting to the provisions in Section 421 Cr.P.C. The respondent against whom an order for interim maintenance has been passed cannot be penalised with an order striking off his defence and in that view of the matter, the final order passed by the Magistrate also cannot be sustained.

4. In the result, the writ petition as well as the Crl.R.P are allowed as above. The matter will stand remitted to the court below for disposal of M.C. No. 349/2004 afresh. Admittedly, the revision petitioner has not deposited any any part of the maintenance as ordered in the final order. He cannot have the luxury of a contested the disposal of the M.C. without payment of some amount towards arrears of maintenance. Accordingly, if the petitioner deposits a sum of Rs.15,000/- within one month from today before the Family Court, Thrissur, the final order dated 26.02.2007 will stand set aside and the Family Court shall dispose of the same in accordance with law after

giving the petitioner an opportunity of substantiating his contentions on merits. If the said amount is not deposited as aforesaid, then the final order will stand confirmed and the Crl.R.P will stand dismissed. The respondent, Thomas shall be entitled to withdraw the said amount as and when it is deposited. It shall be open to the respondent to claim interim maintenance, if any, during the pendency of the proceedings in case he files an application in that behalf.

V. RAMKUMAR, JUDGE.

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